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Justice Scalia's Eighth Amendment Jurisprudence: An Unabashed Foe of Criminal Defendants

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**JUSTICE SCALIA’S EIGHTH AMENDMENT
JURISPRUDENCE: AN UNABASHED FOE OF CRIMINAL
DEFENDANTS**

Michael Vitiello *

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I. INTRODUCTION

Justice Scalia’s death has already produced a host of commentary on his career. Reactions run the gamut from hostile commentary¹ to President Obama’s muted comments about his death² to the full-throated praise from some right-wing commentators.³ This symposium takes a

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1. Jacob Gershman, *Judge Posner: ‘I Regard Posthumous Encomia for Scalia as Absurd,’* WALL ST. J.: L. BLOG (June 27, 2016, 1:53 PM), <http://blogs.wsj.com/law/2016/06/27/judge-posner-i-regard-posthumous-encomia-for-scalia-as-absurd>; Jeffrey Toobin, *Looking Back*, THE NEW YORKER (Feb. 29, 2016), <http://www.newyorker.com/magazine/2016/02/29/antonin-scalia-looking-backward>.

2. Barack Obama, *Remarks by the President on the Passing of the U.S. Supreme Court Justice Antonin Scalia*, THE WHITE HOUSE (Feb. 13, 2016), <http://www.whitehouse.gov/the-press-office/2016/02/13/remarks-president-passing-us-supreme-court-justice-antonin-scalia>.

3. Diana L. Banister, *Justice Scalia’s Life and Death Should be an Example to*

more scholarly approach than have many commentators and asks for an assessment of his impact on criminal law and procedure.

Depending on the issue, Justice Scalia's legacy is quite complicated. For example, Justice Stevens presented a lecture at Washington University in which he discussed Justice Scalia's role in establishing a defendant's right to a jury determination of aggravating factors that resulted in sentence enhancements.⁴ Justice Scalia also forced the Court to rethink the meaning of the Confrontation Clause, adding protection for criminal defendants.⁵ Elsewhere, notably in his Fourth Amendment case law, Justice Scalia's views have had an accordion effect, expanding some Fourth Amendment protections while narrowing other protections. Thus, while claiming that the Court had never abandoned trespass law as defining the meaning of a search, he reestablished its relevance in defining whether a search took place in *United States v. Jones*.⁶ At the same time, he did not abandon the *Katz v. United States*'⁷ reasonable expectation of privacy formulation.⁸ But he also wrote a concurring opinion in *Acevedo v. California*⁹ in which he emphasized his views about decoupling the definition of reasonableness from the warrant requirement. Still more dramatically, he wrote the slim majority opinion in *Hudson v. Michigan*,¹⁰ signaling a narrowing of the exclusionary rule.

Justice Scalia's commitment to originalism explains at least some of his pro-defendant positions.¹¹ Some of his supporters point to such examples to support a claim that Justice Scalia was principled in his application of his jurisprudential philosophy.¹²

This Article focuses on an area where Justice Scalia was an

Washington's Career Politicians, FOX NEWS (Feb. 24, 2016), <http://www.foxnews.com/opinion/2016/02/24/justice-scalia-s-life-and-death-should-be-example-to-washington-s-career-politicians.html>.

4. Justice John Paul Stevens, *Some Thoughts About a Former Colleague at Washington University in St. Louis School of Law* 10-16 (Apr. 25, 2016) (transcript available at https://www.supremecourt.gov/publicinfo/speeches/JPS%20Speech%20Washington%20University%20in%20St%20Louis%20School%20of%20Law_04-25-2016.pdf).

5. *Crawford v. Washington*, 541 U.S. 36 (2004); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009); *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

6. *United States v. Jones*, 565 U.S. 400 (2012).

7. *Katz v. United States*, 389 U.S. 347 (1967).

8. *Jones*, 565 U.S. at 400.

9. *California v. Acevedo*, 500 U.S. 565 (1991) (Scalia, J., concurring).

10. *Hudson v. Michigan*, 547 U.S. 586 (2006).

11. *Jones*, 565 U.S. at 400; *Kyllo v. United States*, 533 U.S. 27 (2001).

12. David B. Rivkin Jr. & Lee A. Casey, *Justice Scalia Kept Constitutional Originalism in the Conversation*, L.A. TIMES (Feb. 15, 2016), <http://www.latimes.com/local/lanow/la-oe-0216-rivkin-casey-scalia-legacy-originalism-20160216-story.html>.

unabashed foe of criminal defendants, his Eighth Amendment jurisprudential dealing with terms of imprisonment. There, based on his reading of the historical record, he argued that the Eighth Amendment's prohibition against cruel and unusual punishment does not include a proportionality principle and concluded that a term of imprisonment need not be proportional to the underlying crime.¹³ This Article examines that conclusion from a number of perspectives and argues that Justice Scalia was wrong about proportionality both as a matter of historical understanding and as a matter of sound policy.

Part II reviews the leading cases in which the Court has established that the Eighth Amendment includes a proportionality principle in cases involving terms of imprisonment.¹⁴ It then turns to Justice Scalia's position in the cases in which the Court has addressed that issue during his tenure on the Court.¹⁵ For Justice Scalia, the matter was straightforward: the original understanding of "cruel and unusual punishment" did not include a proportionality principle in cases involving terms of imprisonment.¹⁶

In Part III, I discuss whether Justice Scalia's conclusion was correct. In fact, many historians disagree with his originalist analysis.¹⁷ Indeed, as I argue below, that is not surprising. Most of us trained in the law are not professional historians, and nothing taught us how to develop a coherent historical methodology.¹⁸ In effect, Justice Scalia got it wrong in his proportionality case law because he engaged in "law office history," the selective reading of a few passages taken out of context.¹⁹

In Part IV, the Article turns to a separate question. Perhaps Justice Scalia got it wrong in his proportionality case law. But maybe, overall, his originalist methodology was worth pursuing. In answering that question, one must address why courts should adhere to the Framers' original understanding of constitutional language. In various publications and elsewhere, Justice Scalia explained his adherence to that methodology.²⁰ This section of the Article focuses on that

13. *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (Alito, J., dissenting); *Graham v. Florida*, 560 U.S. 48, 99 (2010) (Thomas, J., dissenting); *Harmelin v. Michigan*, 501 U.S. 957, 962 (1991).

14. *See infra* Part II.

15. *See infra* Part II, III.

16. *Harmelin*, 501 U.S. at 967.

17. *See infra* Part III.

18. *See infra* Part III.

19. *See infra* Part IV.

20. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862-64; ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (Princeton Univ. Press 1997).

explanation.

Specifically, I examine Justice Scalia's explanation developed in an article published in 1989 in which he called himself a "faint-hearted" originalist.²¹ Over time, he vacillated on the degree of his commitment to originalism, eventually suggesting that his commitment was not so faint-hearted.²² But quite revealing was one of his primary justifications for his adherence to original understanding: he saw his methodology as a restraint on unelected federal judges.²³ Further, in his defense of originalism, Justice Scalia argued that a number of principles justified his abandonment of that methodology.²⁴

The last section of this Article turns to the question of proportionality and asks whether that should have been an area, where even if Justice Scalia's historical analysis was correct, he should have abandoned his methodology. I argue that he should have; Justice Scalia's professed deference to the legislative branch is inappropriate in the criminal sentencing arena.²⁵ As others and I have argued, the legislative process is not well suited to criminal sentencing.²⁶ Often enacted in reaction to the crime of the day,²⁷ sentencing statutes may often result in sentences that are draconian from a number of perspectives. At a theoretical level, those sentences often far exceed the underlying culpability and social harm produced by the offender's conduct.²⁸ From a pragmatic perspective, those sentences often far exceed the amount of prison time needed to protect public safety.²⁹

II. JUSTICE SCALIA AND THE COURT'S VIEWS OF THE EIGHTH AMENDMENT'S PROPORTIONALITY PROVISION

The Eighth Amendment prohibits the government from imposing

21. Scalia, *supra* note 20, at 864.

22. Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAGAZINE (Oct. 6, 2013), <http://nymag.com/news/features/antonin-scalia-2013-10>.

23. Scalia, *supra* note 20, at 862.

24. *Id.* at 864.

25. *See infra* Part IV(b).

26. Michael Vitiello, "Three Strikes" and the Romero Case: The Supreme Court Restores Democracy 38 LOY. L.A. L. REV. 1643 (1997); FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 3, 145, 222-24 (Oxford Univ. Press 2001).

27. Michael Vitiello & Clark Kelso, *A Proposal for Wholesale Reform of California's Sentencing Practice and Policy*, 38 LOY. L.A. L. REV. 903, 916-17 (2004).

28. Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 J. CRIM. L. & CRIMINOLOGY 395, 427 (1997); ZIMRING ET AL., *supra* note 26, at 189-91.

29. ZIMRING ET AL., *supra* note 26, at 3, 145, 189-91.

cruel and unusual punishment and excessive bail and fines.³⁰ The Court has held repeatedly that the Eighth Amendment requires that the imposition of the death penalty be proportionate to the underlying crime.³¹ More controversial has been whether the Eighth Amendment requires a term of imprisonment to be proportional to the underlying crime.

The Supreme Court has addressed that question in a handful of cases.³² Shortly before Justice Scalia's appointment to the bench, the Court decided two cases that seemingly established that courts would intervene if a term of imprisonment was grossly disproportionate to the underlying crime.³³ For a period of time after Justices Scalia and Thomas joined the Court, such claims failed consistently.³⁴ More recently, a series of cases involving offenders who committed their crimes as juveniles has established the principle that a term of imprisonment grossly disproportionate to the underlying crime will trigger judicial intervention under the Eighth Amendment.³⁵ Justice Scalia consistently joined other justices who dissented in those cases.³⁶

In *Rummel v. Estelle*, a prisoner challenged the constitutionality of his term of life in prison imposed under Texas' recidivist statute.³⁷ Rummel, a repeat offender, was convicted of three nonviolent theft offenses involving a total of less than \$230 over a nine-year period.³⁸ *Rummel* relied primarily on *Weems v. United States*, one case in which the Court found a term of imprisonment of fifteen years to be cruel and unusual.³⁹ There, however, the offender, imprisoned in the Philippine territory, was not only sentenced to a long term of imprisonment but was forced to serve that time in chains at hard labor.⁴⁰ In *Rummel*, the deeply

30. U.S. CONST. amend. VIII.

31. *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Graham v. Florida*, 560 U.S. 48 (2010).

32. John F. Stinneford, *Rethinking Proportionality under the Cruel and Unusual Punishment Clause*, 97 VA. L. REV. 899, 902-903 (2011); Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1032 (2004).

33. *Rummel v. Estelle*, 445 U.S. 263 (1980); *Solem v. Helm*, 463 U.S. 277 (1983).

34. *Harmelin*, 501 U.S. at 957; *Ewing v. California*, 538 U.S. 11 (2003).

35. *Miller v. Alabama*, 132 S. Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48 (2010).

36. *Miller*, 132 S. Ct. at 2455 (Scalia, J., dissenting); *Graham*, 560 U.S. at 48 (Thomas, J., dissenting).

37. *Rummel*, 445 U.S. at 266-67.

38. *Id.* at 265-66.

39. *Id.* at 272-78 (citing *Weems v. United States*, 217 U.S. 349 (1910)).

40. In *Weems*, the Court stated:

Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council. These parts of his penalty endure for the term of im-

divided Court upheld the term of imprisonment in partial reliance on the fact that Rummel would be eligible for parole within twelve years.⁴¹ However, the five-justice majority begrudgingly recognized that a term of imprisonment might, under some extreme circumstances, amount to cruel and unusual punishment.⁴²

Three terms later, the Court found that a term of imprisonment violated the Eighth Amendment. In *Solem v. Helm*, another deeply divided Court found that a true life sentence imposed on the prisoner amounted to cruel and unusual punishment on the particular facts of that case.⁴³ The offender, Helm, was sentenced to life without the possibility of parole under South Dakota's recidivism statute.⁴⁴ Although Helm's record was somewhat more serious than was Rummel's, Helm's record involved a series of relatively minor, nonviolent felonies.⁴⁵ Recognizing that successful challenges to terms of imprisonment would be exceedingly rare, the Court found that Helm's true life sentence was cruel and unusual.⁴⁶ On balance, the severity of the punishment far exceeded the gravity of the offense.⁴⁷

Justice Powell's *Solem v. Helm* majority opinion paralleled a well-respected philosophy of punishment. Many commentators recognize that no single justifying aim for punishment works well in all cases.⁴⁸ Retributivism, for example, fails to explain why a fine of \$100 is not sufficient punishment for a person who has stolen \$100.⁴⁹ Proponents of deterrence face other conundrums; for example, they may have trouble explaining why punishing the innocent is impermissible, even if it would

prisonment. From other parts there is no intermission. His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the 'authority immediately in charge of his surveillance,' and without permission in writing.

217 U.S. at 358, 366.

41. *Rummel*, 445 U.S. at 280-81.

42. *Id.* at 278-82, 282 n.27 (concluding that the term of imprisonment imposed on the defendant before the Court was not excessive, implicitly recognizing that a term of imprisonment might violate the Eighth Amendment).

43. *Solem v. Helm*, 463 U.S. 277, 296-97 (1983).

44. *Id.* at 282 (citing S. D. CODIFIED L. § 22-7-8 (1979)).

45. *Id.* at 296-97.

46. *Id.* at 303.

47. *Id.* at 297.

48. JOSHUA DRESSLER & STEPHEN P. GARVEY, *CASES AND MATERIALS ON CRIMINAL LAW* 58-61 (6th ed. 2012).

49. *Id.* at 57.

deter large numbers of offenders.⁵⁰ They also must explain whether extremely long sentences are justified for minor criminal acts if such long sentences are the only means of deterring crime.⁵¹ Similar to Justice Powell's approach, many commentators, and legislators, recognize many competing aims for punishment.⁵² But just desserts work as an outer limit of punishment.⁵³ Thus, Justice Powell's approach allowed courts to intervene when the punishment was too severe when compared to the gravity of the offense.⁵⁴ In turn, the gravity of the offense reflected the social harm and the offender's culpability.⁵⁵

No doubt, the Court recognized limitations on a court's ability to review criminal sentences. On one hand, overly aggressive intervention risked conflict between the courts and the legislature, which has the primary responsibility for determining criminal sentences, and, on the other, between the federal courts and the states, which are responsible for enacting most criminal sentences.⁵⁶ Nonetheless, *Solem v. Helm* seemed to create promise for offenders in extreme cases.⁵⁷

Whatever hope prisoners had that the Court would expand its proportionality review after *Solem v. Helm* was short-lived. Until recent years, litigants raising proportionality challenges faced a far less sympathetic Court than did Helm. Notably, by the time the Court decided *Harmelin v. Michigan*⁵⁸ in 1991, Justice Scalia was on the Court and Justice Kennedy had replaced Justice Powell on the bench.⁵⁹

In *Harmelin*, the offender was sentenced to a term of life in prison without benefit of parole, the mandatory sentence for anyone found guilty of possession of more than 650 grams of cocaine.⁶⁰ Despite being

50. *Id.* at 58-61.

51. *Id.* at 58-59.

52. CAL. PENAL CODE § 17.5 (2016); TEX. PENAL CODE § 1.02 (2015); DRESSLER & GARVEY, *supra* note 48, at 58-59.

53. Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179-182 (Ferdinand Schoeman ed., 1987).

54. *Solem v. Helm*, 463 U.S. 277, 290-91 (1983).

55. *Id.* at 292-94.

56. *Harmelin v. Michigan*, 501 U.S. 957, 998-99 (1991) (Kennedy, J., concurring).

57. I do not want to overstate how often judges would have intervened under the Court's approach in *Solem v. Helm*. Stinneford, *supra* note 32, at 913-14. But some courts, notably the California Supreme Court for a period of time, have aggressively reviewed criminal sentences when prisoners have raised claims of excessiveness. Vitiello, *supra* note 32, at 1029.

58. *Harmelin*, 501 U.S. at 957.

59. Linda Greenhouse, *Reagan Nominates Kennedy to Supreme Court*, N.Y. TIMES (Nov. 11, 1987), <http://www.nytimes.com/1987/11/12/us/reagan-nominates-anthony-kennedy-to-supreme-court.html?pagewanted=all>.

60. *Harmelin*, 501 U.S. at 961.

designated as the plurality opinion, Justice Scalia's opinion represented only his and the Chief Justice's view.⁶¹ Scalia would have overruled *Solem v. Helm* and held that, outside the area of capital sentencing, Eighth Amendment challenges are limited to the method of punishment, not to a term of imprisonment.⁶² At the core of his argument was his belief that the Eighth Amendment as understood in 1791 outlawed only methods of punishment.⁶³

Nevertheless, seven justices agreed that, under some limited circumstances, terms of imprisonment triggered proportionality analysis; four dissenting justices would have found Harmelin's sentence disproportionate under the *Solem v. Helm* analysis.⁶⁴ However, Justice Kennedy concurred with the plurality opinion, and Justices O'Connor and Souter joined him.⁶⁵ Justice Kennedy's proportionality analysis modified Justice Powell's approach in one important respect: his analysis rejected the need for Justice Powell's inter- and intra-jurisdictional analysis.⁶⁶ Specifically, Justice Powell compared the punishment that a similar offender would receive in other jurisdictions and the kinds of offenders that received the same punishment within the same state.⁶⁷ Justice Kennedy found that component of Justice Powell's analysis unnecessary and held that, on balance, the offender's culpability was sufficient to justify the sentence imposed.⁶⁸

Beginning in the early 2000s and again in the next decade, the Court returned to the question of whether particular sentences violated the Eighth Amendment's prohibition against cruel and unusual punishment. It did so in cases where offenders were subjected to extremely long—and as developed below, excessive—sentences that resulted from public and legislative panic over crime rates.⁶⁹

California's Three Strikes law, for instance, was a poorly designed statute that resulted from the public's distress over crime rates. I have described the fraught climate in which California passed this draconian statute in another article:

In 1992 Mike Reynolds, father of murder victim Kimber Reynolds,

61. *Id.*

62. *Id.* at 965.

63. *Id.* at 976, 983.

64. *Id.* at 1009 (White, J., dissenting); *Id.* at 1027 (Marshall, J., dissenting); *Id.* at 1028 (Stevens, J., dissenting).

65. *Id.* at 996 (Kennedy, J., concurring).

66. *Id.* at 1005.

67. *Id.*

68. *Id.* at 1008.

69. *See infra* Part IV.

began a campaign to secure passage of one of the nation's most draconian multiple-offender statutes. When Reynolds first proposed "three strikes" to the legislature, the Assembly Public Safety Committee soundly defeated the bill. Reynolds's subsequent efforts may have failed but for the kidnapping and murder of twelve-year-old Polly Klaas, whose plight galvanized the nation.

Richard Allen Davis, Polly's admitted killer and a repeat offender, symbolized the failure of the criminal justice system; Polly's death was a critical moment for "three strikes." Within days of reports of her murder, "three strikes" gathered 50,000 signatures and was on its way to becoming the fastest qualifying voter initiative in California history. The public's support for the "three-strikes" initiative assured new interest in the legislature when the bill's proponents resubmitted it.

From the inception of "three strikes," commentators along a wide political spectrum raised serious questions about the legislation. Nevertheless, the legislature passed "three strikes" by sizeable majorities in both houses, and Californians voted in favor of the initiative in overwhelming numbers.⁷⁰

Not long after its passage, aggressive prosecutions under the new law gained the public's attention.⁷¹ Many voters must have wondered what they had actually voted for when they saw cases involving trivial third strikes. After all, the campaign literature suggested that the law was aimed at murderers, rapists, and child molesters, not petty thieves.⁷²

One of the several problems with the law was that once an offender had two qualifying serious or violent felonies, he was subject to a minimum term of twenty-five years to life upon the conviction of any third felony.⁷³ A case demonstrating the law's extreme penalties made its way to the Supreme Court in 2003.⁷⁴ Gary Ewing had a nine-year history of crime that included a string of burglaries and robberies in 1993.⁷⁵ Those offenses qualified him for a third-strike sentence when he was arrested for stealing three golf clubs from a golf pro shop.⁷⁶ The trial court refused to strike a prior felony and sentenced Ewing to a term of twenty-five years to life in prison.⁷⁷ After review by the state court of

70. Vitiello, *supra* note 26, at 1644-47.

71. *Id.* at 1026.

72. *Id.* at 1701-02.

73. CAL. PENAL CODE § 667 (2016).

74. *Ewing v. California*, 538 U.S. 11 (2003).

75. *Id.* at 18.

76. *Id.* at 17-18.

77. *Id.* at 20.

appeals, Ewing sought review in the Supreme Court.⁷⁸

A deeply divided Court affirmed Ewing's sentence. Writing for herself and two other justices, Justice O'Connor found that Ewing's sentence did not violate the Eighth Amendment's proportionality principle.⁷⁹ Four dissenting justices argued that the sentence violated that principle as articulated in the Court's earlier case law.⁸⁰ Justice Thomas restated Justice Scalia's position in *Harmelin* that the Eighth Amendment does not include a proportionality principle.⁸¹ Justice Scalia's discussion was curious. He repeated his conclusion that the Eighth Amendment did not contain a proportionality provision.⁸² Nonetheless, he stated that, out of respect for stare decisis, he might follow *Solem v. Helm*'s contrary principle.⁸³ Instead, however, he argued that *Solem v. Helm* merely invites the Court to substitute its policy analysis for that of the legislature.⁸⁴

In the 1990s, some criminologists predicted that a new generation of criminal offenders would become "super-predators."⁸⁵ Not unlike the panic that led to passage of California's Three Strikes law, many state legislatures reacted out of fear of the new criminal menace.⁸⁶ Many states enacted provisions that resulted in juvenile offenders being tried as adults and that often led to sentences of life in prison without benefit of parole.⁸⁷ Cases involving juvenile offenders eventually worked their way to the Supreme Court.

In *Graham v. Florida*, the Supreme Court found that the Eighth Amendment prohibits a state from sentencing a juvenile offender to a true life sentence for a non-homicide offense.⁸⁸ Graham, a deeply troubled youth, was raised by drug addicts and diagnosed with attention deficit disorder at an early age.⁸⁹ He began his violent criminal career at least as early as sixteen years old when he and friends made a botched

78. *Id.*

79. *Id.* at 30-31.

80. *Id.* at 35-36.

81. *Id.* at 32.

82. *Id.* at 31.

83. *Id.* at 31-32.

84. *Id.* at 32.

85. Stephen J. Schulhofer, *Youth Crime – and What Not to Do About It*, 31 VAL. U. L. REV. 435, 439-40 (1997); Michael Vitiello, *The Expanding Use of Genetic and Psychological Evidence: Finding Coherence in the Criminal Law?*, 14 NEV. L. J. 897, 900-01 (2014).

86. James Herbie Difonzo, *Parental Responsibility for Juvenile Crime*, 80 OR. L. REV. 1, 16-17 (2001).

87. *Id.*

88. *Graham v. Florida*, 560 U.S. 48, 48 (2010).

89. *Id.* at 53.

armed-robbery attempt.⁹⁰ Not long thereafter, Graham was involved in a serious home invasion robbery, for which the trial court sentenced him to life without the possibility of parole.⁹¹

Writing for the Court, Justice Kennedy largely followed his analysis from *Harmelin*.⁹² He examined “the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of punishment in question.”⁹³ In that discussion, he also assessed whether the state’s sentencing policy advanced legitimate penological goals.⁹⁴ In reliance on his earlier majority opinion in *Roper v. Simmons*,⁹⁵ Justice Kennedy argued “that because juveniles have lessened culpability they are less deserving of the most severe punishments.”⁹⁶ Further, as compared to adults, juveniles had a “lack of maturity and an underdeveloped sense of responsibility.”⁹⁷ As a result, juveniles are not categorically among the worst offenders.⁹⁸ The Court also found no compelling penological justification that supported life without the benefit of parole for juvenile offenders.⁹⁹

In *Miller v. Alabama*, the Court extended its *Graham* holding.¹⁰⁰ There, the juvenile offenders in *Miller* and a consolidated case, *Jackson v. Hobbs*, were fourteen when they committed their crimes.¹⁰¹ Both juveniles were charged with murder, for which they were sentenced to life without benefit of parole.¹⁰² Writing for a divided Court, Justice Kagan found that life without the benefit of parole for juvenile offenders violated the Eighth Amendment’s prohibition against cruel and unusual punishment.¹⁰³ Thus, *Graham* and *Miller* underscore that the Court has now recognized that the Eighth Amendment includes a proportionality principle in cases involving terms of years.¹⁰⁴

Justice Scalia joined dissents to the Court’s opinions in *Graham*

90. *Id.*

91. *Id.* at 57.

92. *Id.* at 59.

93. *Id.* at 67.

94. *Id.* at 68.

95. *Roper v. Simmons*, 543 U.S. 551 (2005).

96. *Graham*, 560 U.S. at 68.

97. *Id.* (citing *Roper*, 543 U.S. at 569).

98. *Id.* (citing *Roper*, 543 U.S. at 569).

99. *Id.* at 74.

100. *Miller v. Alabama*, 132 S. Ct. 2455, 2455-58 (2012).

101. *Id.* at 2460.

102. *Id.*

103. *Id.*

104. *Graham*, 560 U.S. at 82; *Miller*, 132 S. Ct. at 2455.

and *Miller*.¹⁰⁵ In both cases, the dissenters relied on Justice Scalia's original dissent in *Harmelin*.¹⁰⁶ That is, Justice Scalia held on to his view that, as originally written, the Eighth Amendment did not include a proportionality provision for terms of imprisonment.¹⁰⁷

Obviously, Justice Scalia's supporters might point to his consistency during his tenure on the Court. But, as developed below, his position invites the question of whether his originalist analysis was correct.¹⁰⁸

III. JUSTICE SCALIA'S ERRONEOUS READING OF THE EIGHTH AMENDMENT

Some commentators have questioned Justice Scalia's approach to constitutional interpretation.¹⁰⁹ Even in what many of his supporters consider a tour de force of original interpretation, *Heller v. United States*,¹¹⁰ some critics point out that Justice Scalia needed to abandon the original understanding to resolve many of the questions raised by that case.¹¹¹ Others have pointed out what some have called his "law office history,"¹¹² questioning whether Justice Scalia's analysis was historically sound.¹¹³

That Justice Scalia or other lawyers might not do good historical work should hardly be surprising. We are not trained as historians. No doubt, as some have argued, when lawyers do historical research, they may seize upon out-of-context material and claim that it resolves the historical debate.¹¹⁴ Justice Scalia's *Harmelin* opinion provides an opportunity to examine whether he got history right.

105. *Graham*, 560 U.S. at 97 (Thomas, J., dissenting); *Miller*, 132 S. Ct. at 2477 (Roberts, C.J., dissenting).

106. *Graham*, 560 U.S. at 99-100; *Miller*, 132 S. Ct. at 2483-86.

107. *Graham*, 560 U.S. at 99; *Miller*, 132 S. Ct. at 2486.

108. See *infra* Part III.

109. Michael J. Zydney Mannheimer, *Harmelin's Faulty Originalism*, 14 NEV. L.J. 522, 522, 525-26, 528-29, 531-37, 540 (2014); Stinneford, *supra* note 32, at 938-42.

110. *District of Columbia v. Heller*, 554 U.S. 570 (2008); Randy Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. JOURNAL (June 27, 2008), <http://www.wsj.com/articles/SB121452412614009067>. ("Justice Antonin Scalia's majority opinion in yesterday's Supreme Court decision in *District of Columbia v. Heller* is historic in its implications and exemplary in its reasoning. . . . Justice Scalia's opinion is the finest example of what is now called 'original public meaning' jurisprudence ever adopted by the Supreme Court . . .").

111. Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L.J. 625, 639-40 (2008).

112. *Id.* at 626.

113. *Id.* at 625 n.3.

114. *Id.* at 626-27.

A. *The Harmelin Opinion*

In the opinion, Justice Scalia canvassed the body of literature on the question and rejected the limited authority that supported the conclusion that the Eighth Amendment included a proportionality principle for terms of imprisonment.¹¹⁵ For some time, many scholars accepted that conclusion.¹¹⁶ More recently, however, scholars have raised doubts about Justice Scalia's reasoning. As Professor Michael Mannheimer observed, at least since 2004, scholars have forced a rethinking of whether the Eighth Amendment includes a proportionality provision.¹¹⁷ Both Professors John Stinneford and Mannheimer have laid out the argument that Justice Scalia's position was simply wrong.¹¹⁸

Justice Scalia justified his conclusion that the Eighth Amendment did not include a proportionality provision in reliance on five arguments. The first argument focused on whether the English Bill of Rights of 1689, which was the source of the Eighth Amendment, included a proportionality provision.¹¹⁹

First, the English Bill of Rights' provision was included as a reaction to excesses of members of the King's Bench.¹²⁰ Notably, Lord Chief Justice Jeffreys sentenced Titus Oates, a Protestant cleric, to being defrocked, fined, whipped, and sentenced to life in prison for his perjured testimony in a treason trial against a number of Catholics accused of plotting to assassinate the King.¹²¹ After the adoption of the English Bill of Rights, Oates asked Parliament to commute his sentence.¹²² The House of Commons agreed to do so, but the House of Lords overruled the House of Commons. Members of the House of Lords issued a written dissent.¹²³

Justice Scalia argued from the foregoing that the Eighth Amendment did not include a proportionality provision.¹²⁴ As summarized by Professor Mannheimer, Justice Scalia concluded that the English Bill of Rights' provision "'was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition,' unless a deviation from the common law was authorized by

115. *Harmelin v. Michigan*, 501 U.S. 957 (1991).

116. Stinneford, *supra* note 32, at 926.

117. Mannheimer, *supra* note 109, at 522-23.

118. *Id.* at 540; Stinneford, *supra* note 32, at 907-08.

119. *Harmelin*, 501 U.S. at 966-68.

120. Mannheimer, *supra* note 109, at 526.

121. *Id.* at 526.

122. *Id.* at 527.

123. *Id.* at 527.

124. *Harmelin*, 501 U.S. at 965-66.

Parliament. He considered it ‘most unlikely’ that the Clause forbade disproportionate punishments.”¹²⁵

Justice Scalia’s reading of the record is questionable. True, in part, Oates’ sentence was beyond the judge’s power.¹²⁶ The Lord Chief Justice, for example, lacked the power to order a cleric defrocked.¹²⁷ But the punishment, as a logical matter, may also be outside a judge’s common-law power because the punishment was excessive.¹²⁸ Indeed, commentators have argued based on the same historical record that Justice Scalia was wrong.¹²⁹ Again, as summarized by Mannheimer:

And Sir William Williams commented in the House of Commons that what was objectionable about Oates’ punishment was the accumulation of so many different aspects of punishment to be inflicted on one person. Indeed, because fine, imprisonment, pillorying, and whipping were all commonly used punishments at the time, the better view is that it was the amount of punishment and the combination of punishments that was thought contrary to the Clause. Accordingly, “Justice Scalia’s attempt to separate the unprecedented nature of Oates’s punishments from their excessiveness was mistaken.” The punishments were beyond the judge’s power to impose because they were excessive.¹³⁰

Justice Scalia also had to ignore other parts of the record, notably a statement of the dissenting Lords that contradicted his conclusion.¹³¹

Justice Scalia also argued that, in fact, Oates’ punishment was not excessive.¹³² His perjured testimony led to the execution of innocent men.¹³³ Further, he argued that in the United States and in England, many crimes short of murder were subject to the death penalty.¹³⁴ Neither point gets Justice Scalia very far, however. Under a proportionality analysis, a sentence of death for intentional conduct leading to another person’s death may be proportional. Indeed, that is consistent with the Supreme Court’s current death-penalty case law.¹³⁵ Further, that Congress might impose the death penalty for a variety of

125. Mannheimer, *supra* note 109, at 527.

126. *Id.*

127. *Id.*

128. *Id.* at 529.

129. *Id.*

130. *Id.* at 528.

131. *Id.*

132. *Harmelin v. Michigan*, 501 U.S. 957, 969-75 (1991).

133. *Id.* at 969-70.

134. *Id.* at 974-75.

135. *Coker v. Georgia*, 433 U.S. 584 (1977); *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

crimes does not negate the inclusion of a proportionality provision in the Eighth Amendment as long as all felonies were not subject to the death penalty.¹³⁶ Members of the First Congress seemed to have in mind some kind of proportionality assessment: not all felonies deserved the same punishment.¹³⁷

The penitentiary movement in Pennsylvania seemingly supports the view that at least some policy makers in the eighteenth century were committed to a proportionality principle.¹³⁸ By 1794, Quakers had convinced the Pennsylvania legislature to create two degrees of murder.¹³⁹ Only first-degree murder, a premeditated killing, would lead to the death penalty. Otherwise, offenders were subject to terms of imprisonment.¹⁴⁰

Second, Justice Scalia relied on statements of opponents of the Constitution that he claimed supported his view. He quoted Abraham Holmes and Patrick Henry's comments in opposition to the adoption of the Constitution that seemed to support his view that the Constitution addressed only the method of punishment.¹⁴¹ But this support runs afoul as "law office history."¹⁴² Without a more searching historical inquiry, one ought not to assume that two dissenters' views stood for the broader understanding of the Eighth Amendment or the Constitution more generally.¹⁴³ In addition, even Justice Scalia's use of Patrick Henry's speech ignored other arguments that Henry made.¹⁴⁴

Third, in *Harmelin*, Justice Scalia also relied on language from state constitutions that clearly established their commitment to proportionality and argued that the different textual language in the Eighth Amendment proved that its drafters rejected the principle.¹⁴⁵ For example, the Pennsylvania Constitution, similar to those of other states, makes explicit that punishments be made "in general more proportionate to the crimes."¹⁴⁶ Given that language and the fact that some state constitutions included both a provision requiring proportional punishment and one banning cruel and unusual punishment, Justice Scalia concluded that the

136. Mannheim, *supra* note 109, at 524-25.

137. *Id.* at 530.

138. Cary Bricker & Michael Vitiello, *Chinese Homicide Law, Irrationality, and Incremental Change*, 27 TEMP. INT'L & COMP. L.J. 43, 55 (2013).

139. *Id.*

140. *Id.*

141. *Harmelin v. Michigan*, 501 U.S. 957, 980 (1991).

142. Cornell, *supra* note 111, at 626.

143. Mannheim, *supra* note 109, at 530-31.

144. *Id.*

145. *Harmelin*, 501 U.S. at 982-83.

146. *Id.* at 977.

two protections are not the same.¹⁴⁷ Additionally, he found that the Eighth Amendment's express inclusion of a ban on excessive fines supported the conclusion that proportionality and cruel and unusual punishments are distinct concepts.¹⁴⁸

Justice Scalia ignored counter arguments. For example, as summarized by Mannheimer,

It is true that the Excessive Fines Clause might be read to forbid this type of disproportionality. But there is persuasive evidence that that Clause was intended also to forbid a wholly different kind of disproportionality: excessiveness of fines in relation to the defendant's ability to pay. At common law, one who could not pay a fine was imprisoned until he was able to pay. Thus, absent a ban on the imposition of fines that are beyond the ability of the defendant to pay, any offense for which a fine is a prescribed punishment could in reality be punished by indefinite—even perpetual—imprisonment. Indeed, the history of England is replete with such examples.¹⁴⁹

Recent scholarship has also suggested that the Excessive Fines Clause was not aimed only at assessing a fine in relationship to the underlying offense but also to determine whether the fine would impair the offender's ability to make a living.¹⁵⁰ In either case, contrary to Justice Scalia's conclusion, the two clauses are not redundant even if the framers intended "cruel and unusual punishment" to include a proportionality component.¹⁵¹

Fourth, Justice Scalia found support for his narrow reading of the Eighth Amendment in contemporary judicial rulings.¹⁵² For example, he relied on one New York trial court that referred to the Eighth Amendment without engaging in a proportionality analysis.¹⁵³ He failed to acknowledge that the New York Court of Appeals reviewed the case the following year, and while it affirmed the trial court, it did so in part because the Eighth Amendment was inapplicable to the states.¹⁵⁴ His reliance on other state law cases is also questionable; many of them were decided long after the adoption of the Eighth Amendment and others

147. *Id.* at 976-78.

148. *Id.* at 978-80.

149. Mannheimer, *supra* note 109, at 532.

150. *Id.*

151. *Id.* at 532-33.

152. *Harmelin*, 501 U.S. at 982.

153. *Id.* at 982-83 (citing *Barker v. People*, 20 Johns. 457 (N.Y. Sup. Ct. 1823), *aff'd*, 3 Cow. 686 (N.Y. 1824)).

154. Mannheimer, *supra* note 109, 534-35.

dealt with state constitutional protections.¹⁵⁵ As suggested above, Justice Scalia's efforts to define original public understanding seems to be an exercise in "law office history."

Finally, his reliance on contemporary commentators for support is also open to serious criticism. Professor Mannheimer has demonstrated that Justice Scalia committed two original sins. First, he read some statements as fully supporting his position without recognizing ambiguity in the selected passages.¹⁵⁶ Second, he ignored contrary material. For example, he cited Justice Story's work, but ignored language suggesting that the Eighth Amendment did include a proportionality principle.¹⁵⁷ And he simply ignored Thomas Cooley's discussion of the issue in 1868, contemporaneous with the adoption of the Fourteenth Amendment, which was the vehicle for extending the Bill of Rights to the states.¹⁵⁸

Finally, Mannheimer examined the legislation of several States that attempted to ratify the 1783 Confederal Impost Resolution under the Articles of Confederation for support that the Eighth Amendment included a proportionality principle.¹⁵⁹ As he observed, at least six states included language that was a precursor to the Eighth Amendment's Cruel and Unusual Punishment Clause.¹⁶⁰ Mannheimer reasoned that, because this language was included to constrain Congress' power to punish evaders of the impost, it was clear that "cruel and unusual" in that context referred to punishment that was disproportionate in some way, rather than to the method of punishment.¹⁶¹

In summary, Justice Scalia's historical analysis unravels upon closer examination. At best, a closer look at what historians have to say on the subject weakens confidence in his conclusion. That is not surprising. Further criticism of his originalism analysis surrounds his opinion in *District of Columbia v. Heller*.

155. *Id.* at 535.

156. *Id.* at 536.

157. *Id.* at 537 (Justice Scalia failed to acknowledge language from Justice Story's Commentaries that undercut his argument by demonstrating that the Cruel and Unusual Punishment Clause did address proportionality. Specifically, having just discussed the Cruel and Unusual Punishment Clause, Justice Story stated that "[u]pon this subject, Mr. Justice Blackstone has wisely remarked that sanguinary laws are a bad symptom of the distemper of any state").

158. *Id.* ("Thomas Cooley wrote that 'probably any new statutory offence may be punished to the extent and in the mode permitted by the common law for offences of similar nature.'").

159. *Id.* at 538.

160. *Id.*

161. *Id.*

B. *The Heller Opinion*

Although many of Justice Scalia's supporters view the *Heller* opinion as his most important contribution to original understanding¹⁶²—which is plausible on first reading, because at 17,000 words the decision seems like a tour de force of historical analysis¹⁶³—critics have pointed to at least two flaws in the decision. These two flaws in Justice Scalia's Second Amendment analysis reveal similar weaknesses in his Eighth Amendment proportionality jurisprudence.

One problem with Justice Scalia's historical analysis was that he could not resolve the dispute before the Court merely in reliance on contemporary understanding of the words of the Second Amendment.¹⁶⁴ Most notably, he found that the Second Amendment protected owners of handguns for purposes of self-defense.¹⁶⁵ By contrast, other forms of weapons such as tanks and other military weapons were not within the meaning of the Second Amendment.¹⁶⁶ Such a ruling had to rely on facts never within the understanding of the drafters of the Second Amendment or within public understanding of the contemporaneous language of the Second Amendment.¹⁶⁷

The second and more substantial problem with Justice Scalia's *Heller* analysis was that his history was inaccurate. Saul Cornell, Professor of History at The Ohio State University, summarized the core criticisms of Justice Scalia's conclusion in *Heller* in *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*.¹⁶⁸ For example, in *Heller*, Justice Scalia rejected reliance on nineteenth-century legal commentator Benjamin Oliver. According to Justice Scalia, Oliver was the only contemporary commentator he found who supported the conclusion that the Second Amendment was to apply to militia-related activities only. Cornell found Scalia's rejection of Oliver to be a "glib dismissal."¹⁶⁹ Oliver, according to Cornell, "was among the most prolific and influential popular legal writers of his day."¹⁷⁰ Indeed, Oliver was one of Justice Story's protégés and co-authored an important

162. See, e.g., Eric Posner, *The Tragedy of Antonin Scalia*, SLATE (Feb. 15, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/the_tragedy_of_antonin_scalia.html.

163. Cornell, *supra* note 111, at 626.

164. *Id.* at 627-28.

165. *District of Columbia v. Heller*, 554 U.S. 570, 616 (2008).

166. *Id.* at 627.

167. Cornell, *supra* note 111, at 629.

168. *Id.*

169. *Id.* at 627.

170. *Id.* at 628.

legal reference with the Justice.¹⁷¹

Beyond failing to recognize Oliver's import, Justice Scalia also misstated the record: Oliver was not the only nineteenth century commentator who saw the Second Amendment as limited to militia-related activity.¹⁷² Again, according to Professor Cornell, Justice Story shared Oliver's view.¹⁷³

Further, in *Heller*, Justice Scalia relied on the works of others in interpreting the Second Amendment. Among those sources were articles by two prominent law professors, Eugene Volokh¹⁷⁴ and Randy Barnett.¹⁷⁵ Both are intelligent and highly-regarded scholars,¹⁷⁶ but at least according to their published resumes, neither is a trained historian.¹⁷⁷ Not surprisingly, professional historians like Cornell question their historical analysis.¹⁷⁸ For example, Cornell observes that Professor Volokh's thesis, relied on by Justice Scalia, "had been thoroughly discredited by historian David Konig in an important Essay."¹⁷⁹ Among other comments about Professor Barnett's historical work, Cornell observes that "[w]hat is particularly shocking is that Barnett's analysis of the opinion confuses historical contextualism (the methodology employed by most historians) with Justice Steven's originalist methodology, an approach most historians reject. Curiously, Barnett seems unaware that most historians are militantly anti-originalist."¹⁸⁰

That historians would find Justice Scalia's or Professors Volokh and Barnett's analyses wanting should not be surprising. They, similar to

171. *Id.*

172. *Id.*

173. *Id.*

174. *District of Columbia v. Heller*, 554 U.S. 570, 577, 597 (2008) (citing Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U.L. REV. 793, 814-21 (1998); Eugene Volokh, *Necessary to the Security of a Free State*, 83 NOTRE DAME L. REV. 1, 5 (2007)).

175. *Heller*, 554 U.S. at 587 (citing Randy Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEXAS L. REV. 237, 261 (2004) (book review)).

176. Preston Lerner, *Right Side of the Law: Eugene Volokh's Global Influence*, L.A. MAGAZINE (Apr. 1, 2015), <http://www.lamag.com/citythinkblog/right-side-law-eugene-volokhs-global-influence/>; Sheryl Gay Stolberg & Charlie Savage, *Vindication for Challenger of Health Care Law*, N.Y. TIMES (Mar. 26, 2012), <http://www.nytimes.com/2012/03/27/us/randy-barnetts-pet-cause-end-of-health-law-hits-supreme-court.html>.

177. Eugene Volokh, FACULTY PROFILE U.C.L.A. LAW, <http://law.ucla.edu/faculty/faculty-profiles/eugene-volokh/>; Randy Barnett, FACULTY PROFILE GEORGETOWN LAW, <https://www.law.georgetown.edu/faculty/barnett-randy-e.cfm>.

178. Cornell, *supra* note 111, at 630.

179. *Id.* at 633.

180. *Id.* at 626.

almost everyone else practicing law, were trained as lawyers, not as historians. We are not likely to be trained in how to read original sources.¹⁸¹ As observed by Professor Cornell, many leading historians reject the originalist methodologies used by judges and legal scholars. According to Gordon Wood, who was “perhaps the leading historian on the Founding Era”,¹⁸² “It may be necessary for lawyers and jurists to believe in a ‘correct’ or ‘true’ interpretation of the Constitution in order to carry on their business, but we historians have different obligations and aims.”¹⁸³ Historians typically find wanting the kind of historical analysis that lawyers engage in; that is true whether it is Justice Scalia’s or Justice Stevens’s analysis. For example, as Professor Cornell observed, those engaging in originalist analysis “cherry pick quotes and present this amateurish research as systematic historical inquiry.”¹⁸⁴

IV. ABANDONING ORIGINALISM

To this point, I have explored whether Justice Scalia’s originalist position in *Harmelin* was correct.¹⁸⁵ If Justice Scalia got it wrong in *Heller*, his tour de force of originalist analysis, one should not be surprised if he was mistaken in *Harmelin* as well. As Professors Mannheimer and Stinneford have argued, Justice Scalia was wrong.¹⁸⁶ But assume for a moment that his analysis was correct and that the Eighth Amendment did not include a proportionality provision. Should Justice Scalia have followed his historical understanding of the Eighth Amendment or abandoned it?

That may seem like an odd question to ask about Justice Scalia. He was after all an originalist. But originalists do not always follow the original understanding of the Constitution. Indeed, not long after his appointment to the Court, Justice Scalia described himself as a “faint-hearted” originalist.¹⁸⁷ Some commentators have suggested that during his tenure on the Court, he became a more deeply-committed originalist.¹⁸⁸ Justice Scalia said as much in one interview.¹⁸⁹

181. *Id.* at 626-27.

182. *Id.* at 626.

183. Gordon Wood, *Ideology and the Origins of Liberal America*, 44 WM. MARY Q. 628, 632-33 (1987) (book review).

184. Cornell, *supra* note 111, at 627.

185. *See supra* Part III.

186. *See supra* Part III.

187. Scalia, *supra* note 20, at 864.

188. Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>.

189. Jeffrey Rosen, *What Made Antonin Scalia Great*, THE ATLANTIC (Feb. 15, 2016),

Nevertheless, no one can claim that Justice Scalia was committed only to original understanding.¹⁹⁰ Numerous examples come to mind where he could make no claim that he was following the original understanding of the Constitution. Justice Scalia's fuzzy equal protection argument in *Bush v. Gore*, for example, seems ungrounded in any nineteenth-century understanding of voting rights.¹⁹¹

Even after Justice Scalia became a more deeply-committed originalist, he abandoned that commitment in specific cases. Thus, his earlier explanation for why he would abandon original understanding remains relevant. This section reviews his explanation and then argues that, based on his prior explanation, he should have abandoned the original understanding of cruel and unusual punishment in cases such as *Harmelin* and *Ewing*.¹⁹²

A. Originalism: *The Lesser Evil*

Not long after his appointment to the bench, Justice Scalia delivered a lecture on originalism at the University of Cincinnati which was thereafter published in its law review.¹⁹³ There, in what has come to be called the "Taft lecture," Justice Scalia laid out his arguments for why he was an originalist and also why he would abandon the original understanding in some cases.

In his Taft lecture, Justice Scalia exposed some of the difficulties with originalism.¹⁹⁴ But in the end, Justice Scalia explained why he opted for originalism. In his words, it is the lesser of two evils.¹⁹⁵ His most powerful justification is his belief that adherence to the original understanding of constitutional language protects against justices' substitution of their own values for those of the people.¹⁹⁶ As he stated,

[O]riginalism seems to me more compatible with the nature and purpose of a Constitution in a democratic system. A democratic society does not, by and large, need constitutional guarantees to insure that its

<http://www.theatlantic.com/politics/archive/2016/02/what-made-antonin-scalia-great/462837>.

190. Dan Slater, *Scalia Justifies His Jurisprudence: 'I am Not a Nut,'* WALL ST. JOURNAL (Apr. 8, 2008, 9:17 PM), <http://www.blogs.wsj.com/law/2008/04/08/scalia-justifies-his-jurisprudence-i-am-not-a-nut/> (quoting Scalia: "I am a textualist, I am an originalist. I am not a nut.").

191. *Bush v. Gore*, 531 U.S. 98, 103 (2000); Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L.J. 925, 961-68 (2007).

192. See *infra* Part IV(b).

193. Scalia, *supra* note 20, at 849.

194. *Id.* at 856.

195. *Id.* at 862.

196. *Id.*

laws will reflect “current values.” Elections take care of that quite well. The purpose of constitutional guarantees—and in particular those constitutional guarantees of individual rights that are at the center of this controversy—is precisely to prevent the law from reflecting certain changes in original values that the society adopting the Constitution thinks fundamentally undesirable. Or, more precisely, to require the society to devote to the subject the long and hard consideration required for a constitutional amendment before those particular values can be cast aside.¹⁹⁷

Justice Scalia’s point is an important one. One ought to agree as a general matter that justices should be wary about substituting their own values for those of a majority of Americans.¹⁹⁸

Beyond Justice Scalia’s belief in originalism to be the lesser of two evils, he also explained why he would abandon the original understanding of the Constitution. First, judges under the constitutional scheme should be followers of the law.¹⁹⁹ But in some instances, constitutional language does not provide sufficient guidance.²⁰⁰ Second, notable cases such as *Marbury v. Madison*²⁰¹ present an originalist with a difficult choice.²⁰² The result of such cases may be contrary to the original understanding, but the principle of stare decisis may compel adherence to settled precedent.²⁰³ Third, Justice Scalia observed that he might abandon the original understanding of the Constitution if it would produce a sufficiently objectionable result. He offered the example of flogging, something that might not be cruel and unusual punishment within the original understanding of the Eighth Amendment, but nonetheless so objectionable that he would not uphold such a practice.²⁰⁴

While Justice Scalia substituted his values for those of the majority in some famous cases, I will take his commitment to democracy seriously. Below, I explore why, given his explanation for why he favored originalism and when he would deviate from its command, he should have rejected his narrow view of the Eighth Amendment even if he had been correct in his conclusion about its meaning.²⁰⁵

197. *Id.*

198. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 PUB. L. 279, 282 (1957).

199. Scalia, *supra* note 20, at 863.

200. *Id.*

201. *Marbury v. Madison*, 5 U.S. 137 (1803).

202. Scalia, *supra* note 20, at 861.

203. *Id.*

204. *Id.*

205. *See infra* Part IV(b).

B. *Failure of Democracy*

How might Justice Scalia have viewed whether to abandon the original meaning of the Eighth Amendment, even if we were to assume that that his version of the historical reading of the Amendment was correct?

Although, in his concurring opinion in *Ewing v. California*, Justice Scalia briefly discussed possible adherence to stare decisis, he found the Court's use of a proportionality principle too vague in *Solem v. Helm*.²⁰⁶ Instead, Justice Scalia concluded that *Solem v. Helm* merely invited judges to substitute their own values for legislative determinations.²⁰⁷ He might also have observed that the relevant precedent was not all that strong. Prior to more recent cases similar to *Miller* and *Graham*, the Court had seldom struck down terms of imprisonment on proportionality grounds.²⁰⁸ Certainly, the principle is not as embedded in the case law as is *Marbury v. Madison*'s concept of judicial review.

At the same time, Justice Scalia's own example—that he would strike down a law allowing flogging even if the practice did not run afoul of the original understanding of cruel and unusual punishment—suggests that he was open to abandoning a narrow historical reading of the Eighth Amendment.²⁰⁹ In the same breath, he doubted that such a case would arise, presumably because no legislature would enact such a law.²¹⁰

But do legislatures enact such laws? And if so, is that a sufficient justification to abandon original understanding? At the core of his adherence to originalism was his concern about a judge substituting his or her own values for those of a majority of Americans.²¹¹ And if legislatures enact such extreme laws, who is Justice Scalia to substitute his values for those of elected officials? If such laws are extreme, let the political process correct those excesses.²¹² That might seem to be how Justice Scalia would explain his rejection of a proportionality principle in cases such as *Harmelin*.²¹³

Here is where I believe Justice Scalia has it wrong, even on the assumption that his historical analysis was correct. Obviously, Justice

206. *Ewing v. California*, 538 U.S. 11, 31-32 (2003).

207. *Id.*

208. Vitiello, *supra* note 32, at 1028.

209. Scalia, *supra* note 20, at 864.

210. *Id.*

211. *Id.*

212. *Id.*

213. *Harmelin v. Michigan*, 501 U.S. 957, 959 (1991).

Scalia, like every other justice on the Court, voted during his tenure on the Court to overturn legislation that he found in violation of the Constitution.²¹⁴ Presumably, justices have some guiding principles for when they will overrule the will of the people as reflected in legislation. Excessive punishment calls out for judicial intervention because the political process does not work well to protect criminal defendants' rights.

Take two examples I used above.²¹⁵ California's Three Strikes law is indicative of the failure of the political process to apportion punishment justly.²¹⁶ As I, and others, have written, California's voters and legislature adopted its draconian law at a time of moral outrage at the kidnapping and murder of twelve-year-old Polly Klaas.²¹⁷ Similarly, many of the laws subjecting offenders who committed offenses as juveniles to adult prosecution and severe sentences have been the product of public panic about "super-predators."²¹⁸ Media sources often enflame public passions about crime.²¹⁹ For example, Americans continued to believe that crime rates were increasing even during a prolonged period of declining crime rates.²²⁰

Ample evidence supports the fact that such laws yield unnecessarily long sentences without corresponding decreases in crime rates or increases in public safety. *Punishment and Democracy: Three Strikes and You're Out in California*, published in 2001, remains the best empirical study of the effects of the Three Strikes law.²²¹ Its authors concluded that the law was at best responsible for a miniscule amount of the decline in crime rates in California.²²² Further, the law resulted in long sentences that exceeded the need to incapacitate aging felons.²²³ Indeed, such laws lead to misallocation of resources, resulting in bloated prison costs.²²⁴ Unless one assumes naively that funds are unlimited, spending money on prisons takes resources away from other more effective ways to reduce crime, including increasing the chances of

214. *Shelby County v. Holder*, 133 S. Ct. 2612, 2615 (2013).

215. *See supra* Part IV(b).

216. Vitiello, *supra* note 26, at 1602-05.

217. ZIMRING ET AL., *supra* note 26, at 5-7; Vitiello, *supra* note 28, at 411-12.

218. Difonzo, *supra* note 86, at 25.

219. Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 421-23 (2006).

220. *Id.* at 417.

221. ZIMRING ET AL., *supra* note 26.

222. *Id.* at 97.

223. *Id.* at 72-73.

224. *Id.* at 133-38.

arrest and using more resources for reintegration programs.²²⁵

Similarly, laws that lock up juvenile offenders for life are likely to incarcerate juveniles well passed their criminal years. As has been observed often, crime, especially violent crime, is a young man's game.²²⁶ After about thirty years of age, offenders phase out of their criminal conduct.²²⁷

Justice Scalia seemed to believe that the solution to overuse of incarceration was legislative.²²⁸ Let democracy work. But does it work in the area of criminal sentencing? *Punishment and Democracy* made a compelling case that we are better served by insulating sentencing decisions from direct democracy. The authors argue that given the way in which criminal sentencing laws are enacted, sentences are likely to be excessive.²²⁹ And of course, the authors' empirical research, showing that three-strikes laws lead to sentences that are far longer than needed for public safety, demonstrates the fact that such sentences are excessive.²³⁰

Elsewhere, Western societies, such as the United States, insulate some decisions from the political process when experience demonstrates that democracy leads to bad results. As discussed in *Punishment and Democracy*, every Western democracy insulates monetary policy from popular control, and in the United States, we have relied on the Federal Reserve System since 1913.²³¹ One justification for the decision to insulate monetary policy from the electorate is that democratically responsive institutions produce undesirable levels of inflation.²³²

My point as it relates to Justice Scalia's originalism is this: his central premise for adherence to originalism was his belief in democracy.²³³ Given his willingness to abandon originalism in some cases, I suggest that when democracy does not work well, the Court has a role in protecting individuals harmed.²³⁴ That is hardly a radical

225. Michael Vitiello, *Alternatives to Incarceration: Why Is California Lagging Behind?*, 28 GA. ST. U. L. REV. 1275, 1284 (2012) [hereinafter *Alternatives to Incarceration*]; Michael Vitiello, *Reforming California Sentencing Practice and Policy: Are We There Yet?*, 46 MCGEORGE L. REV. 685, 689 (2014) [hereinafter *Reforming California*].

226. Vitiello, *supra* note 28, at 437.

227. *Id.*

228. *Brown v. Plata*, 563 U.S. 493, 550 (2011) (Scalia, J., dissenting).

229. ZIMRING ET AL., *supra* note 26, at 194.

230. *Id.* at 66-74.

231. *Id.* at 204.

232. *Id.* at 205.

233. *See supra* Part IV(b).

234. Paul Gewirtz, *The Pragmatic Passion of Stephen Breyer*, 115 YALE L.J. 1675, 1675 (2006).

notion.

Justice Scalia might have disagreed, concluding instead that legislatures would act to reform excessive sentencing schemes. He might point to recent efforts at reform around the country.²³⁵ As I have pointed out elsewhere, a broad political consensus favoring reform has emerged. Indeed, in some conservative states, legislatures have enacted meaningful reforms.²³⁶

That position, however, ignores two important points. First, despite a broad consensus favoring reform, many states and the Federal Government have not enacted wholesale reform.²³⁷ Illustrative are efforts in Congress to pass reform where a broad consensus seems to be in place.²³⁸ As I write this Article in the summer of 2016, those efforts seem to have stalled.²³⁹ Many Assistant United States Attorneys have opposed reform.²⁴⁰ Recently, one senator has opposed a bill that would reduce mandatory minimum sentences.²⁴¹ Headlines in the news declare reform dead for this year.²⁴² If one doubts the complex politics of sentencing reform, she should examine how difficult reform has been in California, a typically liberal state, where only through efforts of a three-judge panel of federal judges has tepid reform become a reality.²⁴³ For example, even under pressure from the three-judge panel, the California legislature has resisted putting in place a sentencing commission or undoing the excesses of its Three Strikes law.²⁴⁴ Indeed, politicians of all stripes in California seem unwilling to take a lead in wholesale reform.²⁴⁵

235. *Alternatives to Incarceration*, *supra* note 225, at 1287.

236. *Id.* at 1289.

237. Marc Mauer, *Sentencing Reform Amid Mass Incarceration—Guarded Optimism*, 26 CRIM. JUST. 27, 28-29 (2011).

238. Editorial Board, *Holding Sentencing Reform Hostage*, N.Y. TIMES (Feb. 6, 2016), http://www.nytimes.com/2016/02/07/opinion/sunday/holding-sentencing-reform-hostage.html?_r=0.

239. *Id.*

240. Steven Nelson, *Prosecutors Rally against Sentencing Reform, Say Build More Prisons*, U.S. NEWS (Jul. 17, 2015, 3:36 PM), <http://www.usnews.com/news/articles/2015/07/17/prosecutors-rally-against-sentencing-reform-say-build-more-prisons>.

241. Nick Gass, *Sen. Tom Cotton: U.S. has 'under-incarceration problem'*, POLITICO (May 19, 2016), <http://www.politico.com/story/2016/05/tom-cotton-under-incarceration-223371>.

242. Editorial Board, *supra* note 239; David Hawkings, *'Sentencing Reform' is Seriously Stuck*, ROLL CALL (May 12, 2016), <http://www.rollcall.com/news/hawkings/serious-trouble-sentencing-bill>.

243. *Reforming California*, *supra* note 225, at 729-30.

244. *Id.* at 729.

245. *Id.* at 689; *see also* Michael Vitiello, *Mass Incarcerations: Why are Solutions So Difficult in California*, 15 U. MD. L.J. OF RACE RELIG. GENDER & CLASS 229, 248 (2015).

Second, even if meaningful legislative reform eventually occurs in any given state, many prisoners have served excessive sentences.²⁴⁶ For example, in 2012, California's voters passed an initiative curtailing some of the excesses of its Three Strikes law.²⁴⁷ The law did allow retroactive application of its provisions for some offenders.²⁴⁸ Despite that, the law was little consolation for offenders who served unnecessary years in prison. Prisoners, often disenfranchised as a result of their felony convictions, have little political clout.²⁴⁹ Further, imprisonment is also likely to leave offenders' families with few resources and without resources to lobby in favor of sentencing reform.²⁵⁰ As a result, any claim that prisoners' recourse is the democratic process rings hollow.

As developed above, Justice Scalia found originalism attractive because of its ability to limit unelected judges from imposing their values on society.²⁵¹ My point here is that, when democracy cannot provide an adequate remedy for measurable harm, Justice Scalia's rationale pales. Thus, based on Justice Scalia's rationale, even if his historical analysis were correct, his justification for originalism should have led him to find a proportionality principle in the Eighth Amendment.²⁵²

V. CONCLUSION

This symposium's editors have posed a fascinating question: Was Justice Scalia a friend or foe to criminal defendants? As discussed briefly by way of introduction, in some areas, the record is complicated.²⁵³ Notably, his Fourth Amendment case law is mixed, at times expanding protections but often contracting protections.²⁵⁴ By contrast, his Eighth Amendment position makes him an unequivocal foe of criminal defendants.

246. ZIMRING ET AL., *supra* note 26, at 83-84.

247. CAL. PENAL CODE § 667 (2016).

248. *Id.*

249. Matthew Green, *MAP: States Where Felons Can't Vote*, KQED NEWS (Feb. 23, 2016), <http://www.kqed.org/lowdown/2014/02/26/felon-voting/>.

250. Creasia Finney Hairston, *Prisoners and Families: Parenting Issues During Incarceration*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES (Dec. 1, 2001), <http://aspe.hhs.gov/basic-report/prisoners-and-families-parenting-issues-during-incarceration>; *see also* Bryce Covert, *Here's How Much It Costs to Have a Family Member in Prison*, THINKPROGRESS (Sept. 15, 2015, 10:31 AM), <http://thinkprogress.org/economy/2015/09/15/3701581/incarceration-family-costs/>.

251. *See supra* Part IV(a).

252. *See supra* Part III.

253. *See supra* Part I.

254. *See supra* Part I.

No doubt, Justice Scalia's defenders justify his position in cases like *Harmelin* and *Ewing* as consistent with the original understanding of the Eighth Amendment.²⁵⁵ But an emerging body of literature casts doubt on his conclusion that the Eighth Amendment did not include a proportionality provision.²⁵⁶ Further, his questionable analysis invites a broader discussion of lawyers' and judges' ability to do historical analysis. Without training in historical methodology, judges and lawyers are likely to come to erroneous conclusions and to engage in "law office history."²⁵⁷

Beyond that, justices do not adhere to a single methodology in all cases. Justice Scalia admitted as much.²⁵⁸ This Article has argued that, even had Justice Scalia's historical analysis been correct, he should have abandoned that analysis in his Eighth Amendment jurisprudence.²⁵⁹ Criminal sentencing calls for judicial intervention because it is likely to be an area where the political process will result in excessive sentences and will leave prisoners with no meaningful political power to reform the laws' excesses.

255. *See supra* Part II.

256. *See supra* Part II, III, IV.

257. *See supra* Part III.

258. Scalia, *supra* note 20, at 855.

259. *See supra* Part IV.